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REMARKS

Claims 1–20 are pending in the present application.

Claims 1, 3, 6, 10 and 17 were amended herein.

Reconsideration of the claims is respectfully requested.

35 U.S.C. § 103 (Obviousness)

Claims 1–6 and 8–15 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,285,926 to *Falk et al* in view of U.S. Patent No. 4,317,604 to *Kakauer*. Claims 7 and 16–20 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Falk et al* in view of *Krakauer* and further in view of U.S. Patent No. 5,313,393 to *Varley* These rejections are respectfully traversed.

In *ex parte* examination of patent applications, the Patent Office bears the burden of establishing a *prima facie* case of obviousness. MPEP § 2142, p. 2100-125 (8th ed. rev. 5 August 2006). Absent such a *prima facie* case, the applicant is under no obligation to produce evidence of nonobviousness. *Id.*

To establish a *prima facie* case of obviousness, three basic criteria must be met: First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or

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suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure. *Id.*

Independent claims 1, 10 and 17 have each been amended to clarify that the recited radially askew tray subdivider extends from a peripheral portion of the tray abutting the center support member when the tray is mounted to a distal portion of the tray's periphery. Such a feature is not found in the cited references, taken individually or collectively. The subdivider in *Krakauer* cited in the Office Action extends only between portions of the tray periphery other than the portion which abuts the support member when the tray is mounted.

Independent claim 5 recites five trays mounted at each of nine levels and spaced approximately five inches apart. This combination of trays, levels and spacing is disclosed in the specification (paragraphs [0030]-[0031]) as allowing placement of soft drink cans and nine inch platters on tray sections. Nothing in the cited references suggests such a combination of these features. In connection with this limitation, the Office Action states:

> It would have beend obvious to one of ordinary skill in the art at the time the invention was made to modify the teaching of Falk in view of Krakauer to include only five tray at each level on the center support member (34) versus six trays as specifically taught by Falk (also see 7 trays taught in Krakauer; Figure 2) because a five tray vending maching would be smaller in size and thus require a smaller footprint.
>
> It would have been further obvious to one of ordinary skill in the art at the time the invention was made to modify the teaching of Falk in view of Krakauer to include a distance between each level of the tray platform to be five inches apart. Such a selection would represent a mere design choice of space required for displaying the target items and be well within the level of skill of an artisan.

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Paper No. 20070514, page 6. However, the use of five trays rather than six or seven would not necessarily result in a smaller footprint vending machine. The number of trays employed merely relates to how a 360° area is divided; the footprint of the vending machine will depend more on the radial dimension of the trays, which is not dependent upon the number of trays employed at a given level. With respect to the assertion that five inch spacing between tray levels would be "a mere design choice", to the extent the Office Action asserts that the recited configuation is *per se* obvious, obviousness inquiries have been deemed not to be amenable to *per se* rules due to their highly fact-specific and fact-intensive nature. *In re Ochiai*, 71 F.3d 1565, 1569 (Fed. Cir. 1995). Mere citation of a *per se* rule regarding what constitutes obvious modifications, without identifying a motivation or incentive for the proposed modification, does not establish a *prima facie* case of obviousness.

Independent claim 7 recites a catch on the tray subdivider stopping the vend door. Such a feature is not found in the cited references. The Office Action concedes that none of the cited references teach placing the door catch on the tray subdivider:

> Falk et al. does not disclose using a catch on a tray subdivider for controlling the distance of the vend door opening.
>
> . . . .
>
> Varley teaches of positioning the catch mechanism on the outside of the level tray (Figure 5) but does not disclose positioning the tray latch pin (57) on the partition subdividers.
>
> It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the teaching of Falk in view of Krakauer and Varley to include (incorporate) latch pins disposed on the subdividers to control the size of access to proximate to the position of the location o the subdividers because the control mechanism will not be need to be calibrated once the sizes of the tray zones is changed as different size products are set to be displayed.

Paper No. 20070514, pages 8–9. The "motivation" proposed in the Office Action improperly employs the teachings of the subject application. Moreover, it should be noted that the latch pin 57 is not a stop for controlling opening of the door, but is instead a mechanism for allowing the user to rotate the shelves 24a, 24b, etc. by opening the door.

Therefore, the rejection of claims 1–20 under 35 U.S.C. § 103 has been overcome.

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If any issues arise, or if the Examiner has any suggestions for expediting allowance of this Application, the Applicant respectfully invites the Examiner to contact the undersigned at the telephone number indicated below or at ***dvenglarik@munckbutrus.com***.

The Commissioner is hereby authorized to charge any additional fees connected with this communication or credit any overpayment to Deposit Account No. 50-0208.

Respectfully submitted,

MUNCK BUTRUS, P.C.

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Daniel E. Venglarik
Registration No. 39,409

P.O. Drawer 800889
Dallas, Texas 75380
(972) 628-3621 (direct dial)
(972) 628-3600 (main number)
(972) 628-3616 (fax)
E-mail: *dvenglarik@munckbutrus.com*

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